IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 30.07.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

Crl.A.No.797 of 2001

S.P.Shanmugam .. Appellant/Complainant

vs.

A.Padmanabhan .. Respondent/Accused

This appeal is filed against the Judgment dated 09-08-2001, in C.C.No.685/99 on the file of the Judicial Magistrate No.2, Salem.

For Appellant : Mr.A.Ramesh for M/s.Ram & Ram

For Respondent : Mr.N.A.Ravindran

JUDGMENT

This appeal has been preferred against the judgment in C.C.No.685/1999 on the file of the Judicial Magistrate No.2, Salem.

2.The complainant has preferred a complaint against the accused under Section 138 of the Negotiable Instruments Act,1881(hereinafter referred to as "the Act") on the ground that the impugned cheque for Rs.7,66,820/- drawn by the accused in favour of the complainant under Ex P4 was dishonoured on presentation in the bank. A statutory notice was issued by the complainant under the original of Ex P8, which was received by the accused under Ex P9 and the reply notice was sent by the accused is Ex P10.

3. After taking cognizance of the offence, the learned Judicial Magistrate had taken the complaint on file under Section 138 of the Act and on appearance of the accused on summons, furnished copies under Section 207 of Cr.P.C. and when offence was explained to the accused and questioned the accused pleaded not guilty.

4. On the side of the complainant, P.Ws 1 to 5 were examined and Exs P1 to P15 were exhibited.

4a. P.W.1 is the complainant. According to him, in order to execute a sale deed in favour of one Saradha and her relatives by him and his brothers, a sale agreement was entered into between the parties on 14.8.1998 under Ex P1 and on 12.2.1999, there was a sale agreement entered

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

into between the accused Padmanabhan and Saradha and her relatives under ExP2. He would admit that he and his brothers and sisters have signed in Ex P2 sale agreement and that he was managing the said property on behalf of his brothers and sisters. Ex P3 is the power of attorney dated 25.3.1999 executed by his brothers and sisters in favour of him(P.W.1). As per the sale agreement, according to the complainant, a sum of Rs.7,66,820/- is the amount due from the accused. In order to discharge the said balance amount of sale consideration of Rs.7,66,820/- , the accused had drawn a cheque for Rs.7,66,820/- in favour of the complainant under Ex P4 dated 20.5.1999, a post dated cheque. As per the request of the accused, a general power of attorney was executed in favour of one Saravanan,(son of the accused) on 25.3.1999. When the said cheque Ex P4 was deposited in the bank for collection on 31.8.1999, the same was returned with an endorsement that there is no sufficient funds in the account of the accused. Ex P5 is the counterfoil chalan and Ex P6 is the returned memo issued by the bank along with the impugned cheque Ex P4. Ex P7 is the debit advise by the Bharath Overseas Bank, Salem Town branch in which the complainant is having his account. Under the original of Ex P8, a notice dated 11.9.1999 was issued by the complainant to the accused, which was received by the accused on 14.9.1999 under ExP9 acknowledgment. Ex P10 is the copy of the notice dated 1.10.1999. Ex P 11 is telegraphic notice issued by the accused on 29.9.1999. According to P.W.1, the accused had admitted for having drawn the impugned cheque Ex P4, in Ex P11 reply notice itself. ExP12 is the family arrangement entered into between him and his brothers and sisters. The brothers and sisters of the complainant, according to P.W.1(the complainant) had insisted him (P.W.1) to pay the amount due from the accused and in lieu of that they have received the amount of the impugned cheque from the complainant.

4b. P.W.2 is the Accountant in Bharath Overseas Bank, Salem Town Branch. According to P.W.2, the complainant Thiru S.P.Shanmugam is having savings bank account No.3115 with his branch and that on 31.8.1999, he had deposited a cheque for Rs.7,66,820/- for collection. Ex P5 is the counterfoil chalan relating to Ex P4 impugned cheque. The said cheque was forwarded to Canara Bank,Erumapalayam branch in which the accused is having his account. The said cheque was returned with ExP6 memo from Canara Bank stating that there is no sufficient funds in the account of the accused to honour the same. Ex P7 is the debit advise given by Bharath Overseas Bank, Salem Town Branch.

4c. P.W.3 is the Manager of Canara Bank, Erumapalayam Branch, Salem. He would admit that the accused Padmanabhan is having his current account No. 497 in the said Bank and that Ex P4 cheque was given along with the cheque book to Padmanabhan/the accused herein by the Canara Bank, Erumapalayam Branch, Salem, who would admit that Ex P4 cheque was forwarded to Bharath Overseas Bank, Salem Town Branch to Canara Bank, Erumapalayam branch, Salem for collection on 31.8.1999. Since the amount of Rs.2779/20ps alone was in the credit of the account of the accused as on 31.8.1999, the said impugned cheque Ex P4 was returned with an endorsement that there is no sufficient funds to honour the cheque under

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

ExP6 returned memo. Ex P13 is the copy of the statement of account relating to the period from 19.5.1998 to 24.9.1999 for the account of the accused. Ex P14 is the relevant entries in the cheque returned ledger maintained in his bank. He would further depose that the accused Padmanabhan had closed his account.

4d. P.W.4 is the witness in Ex D20 in favour of Saravanan(the son of the accused). According to him, in his presence, Banumathy had handed over Rs 1,00,000/- to Saravanan and that Banumathy had also signed in his presence in Ex D20. According to him, on 25.7.1999 ie., the date of Ex D20 , Banumathy had received only a sum of Rs.1,00,000/- from the accused and Kumarasamy.

4e. P.W.5 is a witness in Ex P3 power of attorney executed in favour of the accused. On the date of execution of the said power of attorney on 25.3.1999, the complainant's son Angappan had demanded a sum of Rs.1,00,000/- towards his share in the property intended to be sold and the accused handed over a sum of Rs.1,00,000/- to Angappan and obtained Ex D19 in which he(P.W.5) is a witness.

5. When the incriminating circumstances were put to the accused, he would deny his complicity with the crime. He has examined Thiru Saravanan as D.W.1 and marked Exs D1 to D21. Saravanan as D.W.1, would depose that the accused Padmanabhan is his father and the complainant had executed a power of attorney in his favour under Ex P3 and as per the terms of the power of attorney, he has to sell the lands and hand over the sale proceeds to the complainant. He would admit that Ex P4 is the cheque drawn by his father/the accused in favour of the complainant. He also speaks about Exs D19 and D20 receipts. On the basis of the above said documentary and oral evidence, the learned trial Judge has come to a conclusion that the complainant has miserably failed to prove that the impugned cheque Ex P4 was drawn by the accused in favour of the complainant only in order to discharge a subsisting liability and accordingly dismissed the complaint thereby acquitting the accused against which the complainant has preferred this appeal.

6. Now the point for determination in this appeal is whether the findings of the learned trial Court is manifestly illegal and perverse to warrant any interference from this Court?.

7. Heard Mr.A.Ramesh, learned counsel appearing for the appellant and Mr.N.A.Ravindran, learned counsel appearing for the respondent and considered their respective submissions.

8.The point:-

According to the complainant, in order to sell the properties belonging to him and his brothers and sisters, there was an agreement entered into between the accused and the complainant and his brothers and sisters under Ex P1 and Ex P2 and in lieu of those sale agreements, a power of attorney deed was executed in favour of the son of the accused viz., Saravanan and in the said transactions, a sum of Rs.7,66,820/- was due from the accused

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

towards the value of the share of the property intended to be sold through the accused and that only to discharge the said liability, the accused had drawn Ex P4 impugned cheque dated 20.5.1999 in favour of the complainant.

9. Mr.A.Ramesh, the learned counsel appearing for the appellant would focus the attention of this Court to Ex P10 reply notice issued by the accused for the notice he had received under the original of Ex P8. Ex P10 reply notice was preceded by Ex P11 a telegraphic notice under which the accused had asked for three days time to reply the notice sent by the complainant under Ex P8. Under Ex P10, the accused has specifically admitted having drawn the impugned cheque dated 20.5.1999 bearing cheque No.642334 for a sum of Rs.7,66,820/- in favour of the complainant. The defence taken in the said reply notice is that apart from the impugned cheque under Ex P4, he had also handed over another blank cheque bearing cheque No.642335. He would further admit that the said cheque also contain his signature,and that he had made a request to the complainant not to present the impugned cheque Ex P4 till last week of August 1999. He would further admit that the said amount under Ex P4 impugned cheque was towards part of the sale price for the lands belonging to the complainant sold under the sale agreement. But he would contend that in the reply notice Ex P10 the said cheque amount is more than the sale proceeds. But there is absolutely no evidence to show that the accused owes a lessor amount than what he had mentioned in Ex P4 impugned cheque . Even though 21 documents were produced on the side of the accused, there is no document produced by the accused to show that he had demanded the excess payment under Ex P4 impugned cheque from the complainant. So the defence taken under Ex P10 reply notice that Ex P4 impugned cheque was drawn for more than the amount due from the accused to the complainant cannot be sustainable.

10. A perusal of Exs D19 and D20 will go to show that those cheques were not drawn in favour of the complainant. Admittedly, the lands belonging to the complainant as well as his brothers and sisters were agreed to be sold by the accused as seen from Ex P1 and Ex P2. Ex P3 is the power of attorney in favour of Saravanan, the son of the accused. Exs D19 and D20 were issued by Saravanan, the son of the accused and not by the accused himself. Once the accused admits Ex P4 impugned cheque under Ex P10 reply notice, then he cannot wriggle out of his liability under Sections 138 and 139 of the Act. A presumption under Section 139 of the Act is that the holder of a cheque had received the cheque for the purpose of discharging in whole or in part of any debt or other liability, unless the contrary is proved . The defence taken by the accused under his reply notice Ex P10 was not proved by the accused. On the other hand, the accused had admitted the drawal of the impugned cheque Ex P4 in favour of the complainant.

11. The learned counsel appearing for the respondent relying on a decision reported in Crl.A.No.873 of 2004 State of Goa-vs- Sanjay Thaskran and another, with Crl.A.No.874 of 2004 Subhash Chandra Nanda-vs-Sanjay Thakran and another(2007)2 Supreme Court Cases (cri) 162)and

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

contended that a Court sitting in an appeal over acquittal cannot interfere with the findings of the trial Court, unless it is proved that the findings of the trial Court is manifestly erroneous and demonstrably unsustainable and perverse in nature. The exact observation in the above said ratio relied on by the learned counsel appearing for the respondent runs as follows:

> " The jurisdiction of the appellate Court in dealing with an appeal against an order of acquittal is circumscribed by the limitation that no interference is to be made with the order of acquittal unless the approach made by the lower Court to the consideration of the evidence in the case is vitiated by some manifest illegality or the conclusion recorded by the Court below is such which could not have been possibly arrived at by any Court acting reasonably and judiciously and is, therefore, liable to be characterised as perverse. Where two views are possible on an appraisal of the evidence adduced in the case and the Court below has taken a view which is plausible one, the appellate Court cannot legally interfere with an order of acquittal even if it is of the opinion that the view taken by the Court below on its consideration of the evidence is erroneous.

It is further observed by the Honourable Apex Court relying on a Judgment in Ramesh Babulal Doshi-v- State of Gujarat (1996) 9 SCC 225: 1996 SCC (cri) 972)as follows.

> ". . . . . This Court has repeatedly laid down that the mere fact that a view other than the one taken by the trial Court can be legitimately arrived at by the appellate Court on reappraisal of the evidence cannot constitute a valid and sufficient ground to interfere with an order of acquittal unless it comes to the conclusion that the entire approach of the trial Court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. While sitting in judgment over an acquittal the appellate Court is first required to seek an answer to the question whether the findings of the trial Court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate Court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate Court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then- and then only-reappraise the evidence to arrive at its own conclusions".

The Honourable Apex Court, after emphasising the principle laid down in another Judgment in State of Rajasthan-v- Raja Ram(2003)8 SCC 180: 2003

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

SCC (cri) 1965) has observed as follows:

> " There is no embargo on the appellate Court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate Court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not".

There cannot be two opinion with regard to the principles laid down in the above said ratio decidenti of the Honourable Apex Court. In this case also, we have to consider whether the findings of the trial Court are palpably wrong, manifestly erroneous or demonstrably unsustainable. The learned trial Judge carried away by the receipts Ex D19 and Ex D20 executed by Saravanan, the son of the accused, forgetting for a moment, the admission made by the accused Padmanabhan in Ex P10 reply notice that the impugned cheque Ex P4 was drawn by him in favour of the complainant, has come to an erroneous conclusion that Ex P4 impugned cheque was not drawn to discharge the subsisting liability. The learned trial Judge has completely given a go by to Sections 118 and 139 of the Act. There is absolutely no rebuttal evidence let in to discredit Ex P4 impugned cheque. Under such circumstances, I am of the view that it is a fit case for which the findings of the learned trial Judge is to be interfered with since the trial Court Judgment is manifestly erroneous and demonstrably unsustainable and perverse in nature.

12. The other decision relied on is a decision reported in Chandrappa and others-v- State of Karnataka(2007)2 Supreme Court Cases, (cri) 325) by the learned counsel appearing for the respondent is also for the same point which does not have any bearing to the facts of the case.

13 Coming to the question of sentence, I am of the view that the yardstick taken by the Honourable Apex Court in Goa Plasts (P) Ltd-v- Chico Ursula D' Souza(2004)2 Supreme Court Cases,235)can be applied to the present facts of the case, while awarding the sentence to the accused.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

The relevant observation in the said dictum runs as follows:

> " We have no doubt that the respondent has committed an offence punishable under the provisions of Section 138 of the Act an is liable to be punished. The transaction in question took plalce between the parties in the year 1993, therefore, Section 138 , as it stood at the relevant time, would be applicable to the present case. Section 138 provides imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both. Section 138 has now been amended and the penalty of imprisonment for a term which may extend to one year has been substituted by two years as provided by the amending Act 2002 and the fine which may extend to twice the amount of the cheque. This has been prescribed as the punishment for the offence under Section 138 of the Act.
>
> The object and the ingredients under the provisions, in particular, Sections 138 and 139 of the Act cannot be ignored. Proper and smooth functioning of all business transactions, particularly, of cheques as instruments, primarily depends upon the integrity and honesty of the parties. In our country, in a large number of commercial transactions, it was noted that the cheques were issued even merely as a device not only to stall but even to defraud the creditors. The sancity and credibility of issuance of cheques in commercial transactions was eroded to a large extent. Undoubtely, dishonour of a cheque by the bank causes incalculable loss, injury and inconvenience to the payee and the entire credibility of the business transactions within and outside the country suffers a serious set back. Parliament, in order to restore the credibility of cheques as a trustworthy substitute for cash payment enacted the aforesaid provisions. The remedy available in a Civil Court is a long drawn mater and an unscrupulous drawer normally takes various pleas to defect the genuine claim of the payee".

14 Following the principle enunciated in the above said dictum, I am of the view that instead of giving any sentence, the accused can be directed to pay twice the amount of the cheque in this case also. The point is answered accordingly.

15.In the result, the revision is disposed of as hereunder. The findings of the first appellate Court in C.A.No.685 of 1999 on the file of Judicial Magistrate No.2, Salem is set aside. While convicting the accused under Section 138 of the Act, three months time from this date is given to the respondent/accused herein to pay a sum of Rs.15,33,640/- (Rupees Fifteen Lakhs thirty three thousand and six hundred forty) only

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

(twice the amount of cheque) towards compensation to the revision petitioner/ complainant. In default, thereof, the respondent/accused shall suffer simple imprisonment for one year.

sd/-
Asst.Registrar

/true copy/

Sub Asst.Registrar

sg

To,

1. The Judicial Magistrate No.2, Salem
2. -do-through the Chief Judicial Magistrate, Salem

+ 1 cc to Mr.Ram & Ram Advocate SR.NO.47078
+ 1 cc to Mr.N.A.Ravindran Advocate SR.NO.47171

ASM(co)
RD 6.8.07

Crl.A.No.797 of 2001

सत्यमेव जयते
WEB COPY

https://hcservices.ecourts.gov.in/hcservices/